

Maintaining Educational and Athletic Integrity: How Will Schools Combat Performance-Enhancing Drug Use?

“The performance enhancement of society promises to get only more radical, especially as genetic engineering grows more advanced. When people of means can buy sharper brains and stronger bodies for themselves or better genetic profiles for their kids, juiced-up athletes will be the least of our ethical worries. If Giants slugger Barry Bonds deserves an asterisk next to his home-run records, maybe we will deserve asterisks next to our salaries, our sexual conquests and our kids’ SAT scores.”¹

I. INTRODUCTION

The recent steroid controversy in professional sports may only be the beginning of this nation’s relationship with physical and cognitive enhancement drugs.² The market for enhancement drugs is growing at an alarming rate, raising serious ethical, legal, and social issues for our society.³

1. James Poniewozik, *This Is Your Nation on Steroids; Why Does A Performance-Enhanced Society Scorn Performance-Enhanced Athletes?* TIME, Dec. 20, 2004, at 168 (forecasting society-wide moral and ethical dilemma as performance-enhancing drugs become more advanced).

2. PRESIDENT’S COUNCIL ON BIOETHICS, BEYOND THERAPY: BIOTECHNOLOGY AND THE PURSUIT OF HAPPINESS 4-7 (Oct. 2003), available at http://www.bioethics.gov/reports/beyondtherapy/beyond_therapy_final_webcorrected.pdf [hereinafter PURSUIT OF HAPPINESS] (recognizing possible negative impact of biotechnological and neuroscientific developments on humanity); see Joel Garreau, *A Dose of Genius ‘Smart Pills’ Are on the Rise. But is Taking Them Wise?* WASH. POST, June 11, 2006, at D01 (surveying current and future market of cognitive enhancement drugs). Cognitive enhancement drugs, such as Ritalin and Adderall, represent only the inception of the cognitive enhancement industry. Garreau, *supra*, at D01. Memory drugs that improve learning abilities and memory encoding will soon enter the market, which topped \$3.6 billion in 2005. *Id.*; Anastasia Ustinova, *Military Objective: Less Sleep; More Fight; Lexicon Seeks Genetic Answer for Allowing Long Hours of Service Without Slumber*, HOUS. CHRON., Nov. 24, 2006, at Business 1 (reporting on new cognitive enhancement drugs developed for better and extended performance in soldiers). See generally Shaun Assael & Peter Keating, *Special Report: Turning a Blind Eye to Steroids*, ESPN, Nov. 21, 2005, at 69 (detailing Major League Baseball steroid scandal); S.L. Price, *The Liars Club: The Congressional Hearings on Steroids in Baseball, the Bigger-than-Sports Story of the Year, Turned into a Three-Ring Circus. And only the Clown, Jose Canseco, May Have Told the Truth*, SPORTS ILLUSTRATED, Dec. 26, 2005, at 110 (commenting on congressional involvement in Major League Baseball’s steroid controversy).

3. Henry T. Greely, *Neuroethics and ELSI: Similarities and Differences*, 7 MINN. J. L. SCI. & TECH. 599, 599, 613-15, 627-29 (2006) (comparing ethical, legal, and social implications of new genetic and neuroscience technologies); see also Julie Deardorff, *Revving Up the Brain*, CHI. TRIB., Mar. 7, 2004, at Q1 (probing looming moral and ethical issues surrounding future cognitive enhancement drugs); Unmesh Kher, *Can You Find Concentration in a Bottle? A Guide to Today’s Brain-Boosting Pills, and Supplements and What’s in the Pipeline*, TIME, Jan. 16, 2006, at 98 (noting growing market for “brain-boosting” pills in United States). The notion that Ritalin-type drugs might give someone an advantage in their studies or in the

Healthy students at every educational level are increasingly turning to “cognitive performance enhancers,” such as Ritalin, to increase their focus, bolster concentration, and gain a competitive edge over other students.⁴ Consequently, schools will soon be forced to supervise and regulate performance-enhancing drugs to ensure a fair and safe environment for students.⁵

Public schools traditionally focused on protecting students from derailing their lives by abusing drugs and alcohol.⁶ School districts typically employ

workplace is increasing the demand for such drugs. Kher, *supra*, at 98.

4. See, e.g., Mahvish Khan, *Drugs Used to Enhance Studying Draw Concern*, MIAMI HERALD, July 8, 2003, at 1B (highlighting large scale abuse of Ritalin and Adderall by college students); Tyler Peterson & Kirsten Stewart, *Students Use ADD Drugs to Study; Driven: The Pill Abusers Say They Need the Edge They Receive from the Medication*, SALT LAKE TRIB., July 26, 2005, at A1 (investigating escalating ADD drug abuse in colleges and noting inadequate college prevention and detection techniques); Linda Ciampa, *Ritalin Abuse Scoring High on College Illegal Drug Circuit*, CNN.COM, Jan. 8, 2001, <http://archives.cnn.com/2001/HEALTH/children/01/08/college.ritalin/index.html> (suggesting Ritalin abuse growing due to drug’s study enhancement effects). A 2002 Johns Hopkins University study revealed that as many as one-in-five college students use Ritalin or Adderall to boost their studying skills. Khan, *supra*, at 1B; see DRUG ENFORCEMENT ADMIN., U.S. DEPT. OF JUSTICE, DRUGS OF ABUSE 31-36 (Donald E. Joseph ed., 2005), available at <http://www.usdoj.gov/dea/pubs/abuse/doa-p.pdf> [hereinafter DRUGS OF ABUSE] (describing enhancement effects of stimulants and corresponding health risks); Gene R. Haislip, Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Admin., DEA Report: ADD/ADHD Statement of Drug Enforcement Administration at the Conclusion of the Conference on Stimulant Use in the Treatment of ADHD (Dec. 12, 1996), available at <http://www.add-adhd.org/ritalin.html> (noting increase in Ritalin abuse reports among children since 1990). Doctors prescribe Ritalin, Methylin, and Concerta, all composed of Methylphenidate, a Schedule II substance, to treat Attention-Deficit Disorder (ADD) and Attention-Deficit/Hyperactivity Disorder (ADHD) in children. DRUGS OF ABUSE, *supra*, at 35. Other stimulants with similar enhancement and “upper” capabilities include, amphetamines (Adderall, Dexedrine, Dextrostat), methamphetamines (Desoxyn) and cocaine. *Id.* at 34-35. The report observes a 1000% increase in use among the ten-to-fourteen age group. Haislip, *supra*.

5. See Larry Atkins, *Schools Need to Crack Down on Ritalin Use*, BALT. SUN, Feb. 20, 2001, at 11A (revealing prescriptions for Ritalin have increased by 700% since 1990); Amy Reinink, *Colleges Eye Ways to Curb Ritalin Abuse*, DENVER POST, Dec. 13, 2001, at A-29 (reporting on rampant performance-enhancing drug abuse in colleges and high schools); see also Andrew Jacobs, *The Adderall Advantage*, N.Y. TIMES, July 31, 2005, at 4A (discussing unfair advantages obtained by college students who illegally abuse Ritalin); Skip Bayless, *The Future Shock of Steroids*, ESPN.COM, Nov. 11, 2005, <http://sports.espn.go.com/espn/print?id=2220733&type=story> (suggesting Congress should pass legislation regulating performance-enhancing drugs at every level of sports). Students that decide not to use performance-enhancing drugs may resent their classmates who illegally use the drugs to bolster their academic performance. Jacobs, *supra*, at 4A. One Columbia University student indicated that he uses Adderall because “[t]he environment . . . is incredibly competitive If you don’t take them, you’ll be at a disadvantage to everyone else.” *Id.*; cf. Meredith Nadler, *Pharmaceutical U.*, BOSTON MAG., May 2004, at 72 (investigating university disinterest in, and passive approach to, prescription drug abuse on campus).

6. See Bd. of Educ. v. Earls, 536 U.S. 822, 834 (2002) (noting governmental concern in preventing adolescent drug use); Roscoe C. Howard, Jr., *Vernonia School District 47j v. Acton: The Right Response for Drug Testing of Student Athletes*, 6 KAN. J.L. & PUB. POL’Y 17, 17-19 (1997) (describing public schools’ efforts to curb drug use through testing policies); see also Press Release, L.D. Johnston, et al., *Teen Drug Use Down But Progress Halts Among Youngest Teens* (Dec. 19, 2005), <http://www.monitoringthefuture.org/data/05data.html#2005data-drugs> (describing trends in teen drug use in 2005). In 2005, 21% of eighth-graders, 38% of tenth-graders, and 50% of twelfth-graders surveyed had tried illegal drugs in their lifetimes. *Id.* The statistics show that at least 50% of teenagers have tried drugs by their high school graduations. *Id.*

various learning programs and prevention procedures, such as random drug testing, to detect and prevent illegal drug use.⁷ Schools could use these existing programs, particularly the drug testing policies, as a blueprint to educate and prevent students from using performance-enhancing drugs.⁸

Historically, schools struggled to institute drug and alcohol testing programs because such testing is considered a search under the Fourth Amendment, which ensures “[t]he right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures”⁹ The right to be free from unreasonable searches applies to all individuals in America, but the Supreme Court has developed exceptions to the Fourth Amendment to permit “reasonable searches and seizures” in the public high school setting.¹⁰ Balancing the government’s interest in safety against the students’ privacy concerns, the Court determined that a school’s desire to prevent and deter drug use can outweigh student privacy interests.¹¹

This Note explores the history of suspicionless drug testing and performance-enhancing drug abuse in public high schools.¹² Specifically, this Note argues that public high schools across the country should implement performance-enhancing drug regulation and education programs to prevent

7. See *infra* notes 38-40 and accompanying text (describing school district’s drug testing program instituted to combat student drug problems). See generally Alexander C. Black, Annotation, *Search Conducted by School Official or Teacher as Violation of Fourth Amendment or Equivalent State Constitutional Provision*, 31 A.L.R. 5TH 229 (1995) (providing history of constitutionally protected school drug testing policies).

8. See *Miller v. Wilkes*, 172 F.3d 574, 576 (8th Cir. 1999) (upholding school district’s drug testing policy which included urinalysis testing for misused prescription drugs); *Schools Seek to Curb Drug Use with New Testing Programs*, ASSOCIATED PRESS, (2006), <http://www.kctv5.com/global/story.asp?s=4421759&ClientType=Printable> [hereinafter *New Testing Programs*] (reporting various ways schools implement steroid testing). The random drug testing program at schools in the Grapevine-Colleyville public school district includes a urinalysis that detects steroids. *New Testing Programs, supra*. The Anabolic Steroid Control Act of 2004 approved \$15 million per year, from 2005 to 2010, for preventative educational programs in high schools. See also Anabolic Steroid Control Act of 2004 §§ 4(c), (d), Pub. L. No. 108-358, 118 Stat. 1664 (codified as amended at 42 U.S.C. §§ 290bb-25f) (allocating \$15 million per year to steroid abuse education in schools).

9. U.S. CONST. amend. IV; see Black, *supra* note 7, at 34 (summarizing factors used to determine constitutionality of school drug testing policies).

10. *New Jersey v. T.L.O.*, 469 U.S. 325, 338-42 (1985) (holding search of student’s purse reasonable in school setting). Justice White asserted that a school officer’s search of a fourteen-year-old student’s purse was constitutionally reasonable even in light of a student’s privacy expectations. *Id.* at 341-42. The Court balanced the students’ privacy interests against the school’s need to maintain order in the classroom. *Id.* at 339-40. The school setting “requires some easing of the restrictions to which searches by public authorities are ordinarily subject.” *Id.* at 340. The Court held that in light of the governmental interest and special circumstances, it is not practical to require a school officer to obtain a warrant or satisfy probable cause requirements, and therefore, the school officer’s search was reasonable. *Id.* at 340-43.

11. See *Vernonia Sch. Dist. 47j v. Acton*, 515 U.S. 646, 665 (1995) (holding suspicionless drug testing program for student-athletes constitutional). The Court concluded that a suspicionless drug testing program for all student-athletes was constitutional because of the students’ “decreased expectations of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search” *Id.* at 664-65.

12. See *infra* Parts II.A, B, C (outlining suspicionless drug testing jurisprudence, particularly two landmark decisions).

students' illicit use of performance-enhancing drugs.¹³ Further analysis focuses on the ethical, health, and legal concerns stemming from the use of performance-enhancing drugs, particularly steroids and Ritalin.¹⁴ Finally, this Note recommends steps that state school districts should take to ensure a fair and safe school environment, free from drug-induced scholastic and athletic achievements and the influence of performance-enhancing drugs.¹⁵

II. HISTORY

A. *The Fourth Amendment Applied to Students*

The Fourth Amendment applies to all school-administered drug and alcohol testing.¹⁶ The Fourth Amendment does not forbid all searches, only those that are unreasonable.¹⁷ Generally, a search is reasonable only if officials conduct it pursuant to a warrant and based upon probable cause.¹⁸ There are, however, certain exceptions that allow government officials to depart from the normal judicial process.¹⁹ One exception, the "special needs" doctrine, is applied "only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."²⁰ When determining whether a search falls under the special

13. See *infra* Part III (providing various options for schools to combat growing problem).

14. See *infra* Part III (reviewing issues surrounding performance-enhancing drugs).

15. See *infra* Part IV (concluding performance-enhancing drugs should be regulated to ensure safety and fairness).

16. *New Jersey v. T.L.O.*, 469 U.S. 325, 336-37 (1985) (holding school officials are representatives of state). School officials are state actors for constitutional purposes and may not claim immunity from Fourth Amendment restrictions. *Id.* at 336-37.

17. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617-19 (1989) (noting all drug testing intrudes upon reasonable privacy expectations and constitutes search under Fourth Amendment). In *Skinner*, the Court declared the drug tests that the Federal Railroad Administration administered to railroad employees involved in train accidents constituted searches under the Fourth Amendment. *Id.* at 617. The Court held that the drug tests were reasonable considering the gravity of the government's compelling interest, namely "[t]o prevent or deter that hazardous conduct, and since the gravamen of the evil is performing certain functions while concealing the substances in the body, it may be necessary . . . to examine the body or its fluids to accomplish the regulatory purpose." *Id.* at 633. The Court determined that a warrant, probable cause, or individualized suspicion of drug abuse requirement would impede the employer's ability to obtain the pertinent information. *Id.* at 631.

18. *Katz v. United States*, 389 U.S. 347, 357 (1967) (stressing searches lacking prior judicial approval per se unreasonable under Fourth Amendment). The Court declared that the Fourth Amendment requires adherence to the judicial process when conducting a search. *Id.* at 357. The Court did acknowledge a few well-defined exceptions to the per se rule that a warrant, based upon probable cause, is necessary for a search. *Id.*

19. *Id.* (noting exceptions to warrant and probable cause requirements).

20. *T.L.O.*, 469 U.S. at 351-52 (Blackmun, J., concurring) (explaining special needs situations rendering searches reasonable despite lack of warrant or probable cause). Justice Blackmun explained that a balancing test is used only where a court is confronted with a special need that may necessitate relief from traditional Fourth Amendment search and seizure protections. *Id.* at 351. Justice Blackmun insisted that the special needs balancing test is only a narrow exception. *Id.* at 352. He further stated, however, that "[t]he special need for an

needs doctrine, courts balance the individual's Fourth Amendment privacy rights against the government's legitimate interests.²¹

B. Suspicionless Drug Testing in High Schools

In *Vernonia School District 47j v. Acton*,²² the United States Supreme Court expanded the special needs doctrine to include suspicionless drug testing in high schools.²³ The Vernonia School District instituted the drug program to prevent drug use, protect the health and safety of the student-athlete, and provide student-athlete drug users with assistance programs.²⁴ The Court held that Vernonia's drug testing program, challenged by a student athlete, was constitutional.²⁵

The Court first analyzed the nature of the student-athlete's privacy interest upon which the searches intruded.²⁶ The Court determined that parents commit their children to the temporary custody of school officials, who then, in some

immediate response to behavior that threatens either the safety of schoolchildren and teachers or the educational process itself justifies the Court in excepting school searches from the warrant and probable-cause requirement, and in applying a standard determined by balancing the relevant interests." *Id.* at 353.

21. See *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 677 (1989) (holding suspicionless drug testing policy for customs agents monitoring border constitutional). The Court found that the government's interest in protecting national borders was compelling. *Id.* at 677. The implicit nature of a customs agent's job, involving drugs and firearms, made a suspicionless drug testing program reasonable even in light of the intrusion upon the agent's privacy expectations. See *id.*; see also *Skinner*, 489 U.S. at 634 (approving suspicionless drug testing searches of railroad personnel). But see *Chandler v. Miller*, 520 U.S. 305, 322 (1997) (holding suspicionless drug testing program for public office candidates unreasonable). The Supreme Court struck down Georgia's suspicionless drug testing policy that subjected candidates for certain public office positions to such testing. *Id.* The Court decided that the lack of any indication of drug abuse by public officials suggested there was no "special need" for the policy, making it an unreasonable intrusion of the candidates' Fourth Amendment privacy rights. *Id.* at 320; see also *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979) (insisting individual's privacy and security interests protected against unreasonable intrusions). The *Prouse* Court declared unreasonable an automobile search and seizure, where the police officer had no individualized suspicion and merely stopped the driver to check his license and registration. *Prouse*, 440 U.S. at 663. The Court balanced the driver's privacy expectation against the police officer's interest in searching cars at random and found the search to be unreasonable. *Id.* at 654.

22. 515 U.S. 646 (1995).

23. See *id.* at 664-65 (holding suspicionless drug testing program for student-athletes constitutional).

24. *Id.* at 646, 650 (listing goals of student athlete drug policy). The testing policy only applied to students involved in athletics. *Id.* at 657. The school required students interested in playing sports to sign a form consenting to the drug testing. *Id.* at 650. School officials tested the students during the first week of the athletic season, and then randomly tested throughout the rest of the season. *Id.* Each week, school officials placed all of the athletes' names into a pool and a student, supervised by two adults, randomly selected 10% of the names for drug testing. *Id.* If a sample tested positive, school officials conducted a second test as soon as the notification of the first test arrived. *Id.* at 651. If the second test was negative, school officials took no further action. *Id.* If the second test was positive, school officials convened a meeting with the student and his or her parents, and gave the student the option between participating in a six-week assistance program, which included weekly testing, or suspension from athletics for the rest of the remaining season and all of the following season. *Id.*

25. *Id.* at 657 (validating Vernonia's student-athlete drug testing policy).

26. *Vernonia Sch. Dist.*, 515 U.S. at 654 (focusing on nature of student's privacy interest).

instances, act in loco parentis.²⁷ As children have considerably lower privacy expectations in the presence of their parents, the same reduced privacy expectations exist in the school setting, where school officials assume some of the same parental power.²⁸ Additionally, the Court reasoned that student athletes have a lower expectation of privacy than non-student athletes because of the nature of sports.²⁹ Students who voluntarily choose to play sports subject themselves to “an element of ‘communal undress’ inherent in athletic participation.”³⁰

The Court also focused on the nature of the testing itself, stating that the degree of the intrusion depends on the manner in which the school officials collect the sample.³¹ The intrusion was negligible, because the conditions of the intrusion resembled conditions found in a public restroom.³² Additionally, the Court analyzed the invasiveness of the urinalysis in terms of the information it disclosed, and determined that the test only checked for standard drugs, as opposed to testing to discern whether the student is epileptic, pregnant, or diabetic.³³ The internal intrusion of the test was slight because school officials kept the results of the test relatively private and the scope of the test was narrow.³⁴ The Court did not consider the requirement that students identify, in advance, any prescription medications they take to be a significant inconvenience, even though such a requirement revealed confidential information.³⁵

Further, the Court considered the “nature and immediacy of the

27. *Id.* at 654-55 (describing school’s role as temporary guardian). The Court found that the central focus of their inquiry was “(1) children, who (2) have been committed to the temporary custody of the State as schoolmaster.” *Id.* at 654.

28. *Id.* at 664-65 (acknowledging students have lower expectation of privacy in school). The Court noted a child’s privacy rights differ from other circumstances in the public school setting, though they do not completely shed their constitutional rights. *Id.* at 655-56.

29. *Id.* at 657 (concluding student athletes have lower expectation of privacy than students generally). As participating in school sports requires students to change before engaging in athletics, and shower afterwards, student athletes are less timid. *Id.*

30. *Vernonia Sch. Dist. 47j v. Acton*, 515 U.S. 646, 657 (1995) (citing *Schailly by Kross v. Tippecanoe County School Corp.*, 864 F.2d 1309, 1318 (1988)) (describing atmosphere in high school locker rooms).

31. *Id.* at 658 (outlining actual process school followed to conduct testing). Under the drug program, male students produce urine samples, fully clothed, while standing at a wall and observed by a monitor from behind. *Id.* Female students produce urine samples while enclosed in a stall, with a female monitor standing outside. *Id.*

32. *Id.* at 657 (deciding testing conditions similar to conditions generally encountered in public restrooms).

33. *Id.* at 658 (outlining type of information testing produces).

34. *Vernonia Sch. Dist.*, 515 U.S. at 658 (1995) (analyzing intrusion of testing results on students’ privacy interest).

35. *Id.* at 658 (affirming requirement that students provide medical prescriptions before testing takes place). Though the Court encouraged drug testing programs that do not require disclosure of medical information unless the individual tests positive, the additional requirement that students provide medical prescriptions before the testing took place was not so intrusive that it rendered the drug testing program unreasonable. *Id.* at 659-60.

governmental concern . . . and the efficacy of the means for meeting it.”³⁶ The governmental interest must be important enough to justify the search being conducted.³⁷ The Court asserted that deterring student drug use sufficiently offsets the intrusion of the drug testing.³⁸ A drug-fueled rebellion within the school, largely composed of student athletes, contributed to the necessity of the suspicionless drug tests in the Vernonia School District.³⁹ After considering the student athletes’ lower expectation of privacy, the unobtrusive nature of the search, and the pressing need for drug testing in the Vernonia School District, the Court concluded that the suspicionless drug testing program was reasonable and did not violate the students’ Fourth Amendment privacy rights.⁴⁰

In *Board of Education v. Earls*,⁴¹ the Supreme Court further expanded the special needs doctrine to include suspicionless drug testing aimed at student athletes and students involved in extracurricular activities.⁴² Although the school district did not demonstrate an urgent drug problem, the Court believed that

[t]he need to prevent and deter the substantial harm of childhood drug use

36. *Id.* at 660-64 (discussing government’s interest in protecting students, preventing drug use, and means used for drug testing).

37. *Id.* at 661 (clarifying requisite governmental interest justifying intrusive search).

38. *Vernonia Sch. Dist. 47j v. Acton*, 515 U.S. 646, 661 (1995) (comparing governmental concern over drug abuse in school to other reasonable governmental concerns). The Court compared the government’s interest in deterring student drug use to the government’s interest in protecting our borders, which justified suspicionless drug testing in *Von Raab*. *Id.* The Court also compared the government’s interest in preventing drug use to testing railroad engineers to ensure safe travel on railways as demonstrated in *Skinner*. *Id.* The Court concluded that deterring drug use in schools is just as important as protecting our borders and railways. *Id.* The impact of drugs is never greater than when young children’s nervous systems are maturing. *Id.* at 661. The consequence of drug abuse in schools is not limited to the damage done to children, however, as it affects the entire student body, faculty, and the general educational process. *Id.* at 662.

39. *Id.* at 662-63 (highlighting rising drug abuse in Vernonia School District).

40. *Id.* at 664 (holding suspicionless drug testing program did not violate students’ Fourth Amendment privacy rights).

41. 536 U.S. 822 (2002).

42. *Id.* at 838 (holding suspicionless drug program testing students involved in extracurricular activities reasonable under Fourth Amendment). The Court employed the same balancing test that is utilized in *Vernonia*. *Id.* at 830. First, the Court looked to the nature of the privacy interest that the drug testing compromised. *Id.* Although non-athletic students who participate in extracurricular activities are not as accustomed to privacy intrusions as student-athletes, the Court found that participation in extracurricular activities lends itself to similar privacy intrusions. *Id.* at 831-32. The Court concluded, therefore, that such students have a limited expectation of privacy. *Id.* at 832. The Court then considered the character of the search, and determined it was less invasive than the *Vernonia* testing program. *Id.* at 833. Both the male and female students in *Earls* produced their urine sample in an enclosed stall, whereas the male students in *Vernonia* produced their sample in an open stall with monitors observing from behind. *Id.* at 832. Further, the test results in *Earls* did not lead to any type of suspension or disciplinary measures and only limited the student’s participation in the extracurricular activities after a parent meeting. *Id.* at 833-34. The Court then examined the government’s concerns and the effectiveness of the instituted program. *Id.* at 834. The Court asserts that the “nationwide drug epidemic makes the war against drugs a pressing concern in every school.” *Id.* Finally, the Court addressed the safety interest, another *Vernonia* factor, concluding that though drugs pose a particular safety threat to athletes on the athletic field, they also pose considerable safety concerns to children in general. *Id.* at 836-37.

provides the necessary immediacy for a school testing policy. . . . [I]t would make little sense to require a school district to wait for a substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program⁴³

After considering the nationwide adolescent drug problem and employing the three-part balancing test used in *Vernonia*, the Court held that the district's suspicionless drug test applied to a larger body of students, lacking an urgent, particularized drug problem, was reasonable.⁴⁴

C. Performance-Enhancement Drugs: Outlook

In his 2004 State of the Union Address, President Bush emphasized the escalating use of performance-enhancing drugs in our society and made it an issue of national concern:

The use of performance-enhancing drugs like steroids in baseball, football, and other sports is dangerous, and it sends the wrong message—that there are shortcuts to accomplishment, and that performance is more important than character. So tonight I call on team owners, union representatives, coaches, and players to take the lead, to send the right signal, to get tough, and to get rid of steroids now.⁴⁵

Although President Bush's statement was directed at the ongoing steroid abuse plaguing professional sports, the broader message is germane to all forms of enhancement drugs and the impact they have upon our society.⁴⁶ Powerful enhancement drugs, including those already on the market and others coming down the pipeline, that researchers developed for sick or disabled people, are increasingly available to healthy individuals seeking to advance their natural abilities illegally.⁴⁷ With the increased accessibility to physical and pharmacological enhancement drugs, such as steroids and Ritalin, which enhance athletic ability and cognition stamina, respectively, regulation of

43. *Id.* at 836. (examining necessary governmental interest in instituting drug program). The School District presented some evidence of drug use in Tecumseh, but it was not as pervasive as the drug use in *Vernonia*. *Id.* at 834-36. The Court stated that it did not require a particularized serious drug problem to find a suspicionless drug testing program constitutional and the Court refused to "articulate a threshold level of drug use that would suffice to justify a drug testing program for schoolchildren . . . [and] what would in effect be a constitutional quantum of drug use necessary to show a 'drug problem.'" *Id.* at 836.

44. *Id.* at 838 (explaining drug testing policy reasonable means of furthering important governmental interest).

45. George W. Bush, President, State of the Union Address (Jan. 20, 2004), available at <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html> [hereinafter State of the Union Address] (asserting initiative to get rid of steroids at every level of athletics).

46. *See id.* (identifying steroid abuse problem in sports and advocating for crackdown on cheating); *see also* Greely, *supra* note 3, at 627 (recognizing societal impact of advancements in genetics, neuroscience, physical, and cosmetic fields).

47. *See* Greely, *supra* note 3, at 628-29 (describing future enhancement drugs and noting healthy individuals' ease of access to enhancement drugs); *see also* Deardorff, *supra* note 3, at Q1 (detailing possible development of new enhancement drugs).

performance-enhancing drug abuse will become increasingly difficult.⁴⁸

1. Physical-Enhancement Drugs

Individuals seeking to enhance their athletic performance and improve their physique often use steroids and pharmacologically-related substances.⁴⁹ The Controlled Substances Act (CSA) defines “anabolic steroids” as “any drug or hormonal substance, chemically and pharmacologically related to testosterone”⁵⁰ Testosterone spurs muscle growth and the development of male sexual characteristics.⁵¹ There are over one hundred types of synthetic anabolic steroids, all of which are illegal, unless prescribed by a doctor for a legitimate medical problem.⁵² The illegal possession or sale of anabolic steroids may result in a maximum penalty of one year imprisonment.⁵³

Typically, student-athletes use steroids to obtain a competitive edge and

48. See Greely, *supra* note 3, at 629 (noting ability to regulate pharmacological enhancements in future may be challenging). See also PURSUIT OF HAPPINESS, *supra* note 2, at 4-7 (discussing physical and mental impact of biotechnology upon individual).

49. See Drug Enforcement Administration, *Steroid Abuse in Today's Society: A Guide for Understanding Steroids and Related Substances*, <http://www.deadiversion.usdoj.gov/pubs/brochures/steroids/professionals/index.html> (Mar. 2004), [hereinafter *Steroid Abuse in Today's Society*] (stressing widespread use of steroids throughout society); NATIONAL INSTITUTE ON DRUG ABUSE, INFOFACTS: STEROIDS (ANABOLIC-ANDROGENIC), 1 (Mar. 2007), available at <http://www.drugabuse.gov/PDF/Infofacts/Steroids07.pdf> [hereinafter *STERIOD INFOFACTS*] (describing individual's possible motivations behind illegally abusing steroids).

50. 21 U.S.C. § 802(41)(A) (2000) (setting forth definition of anabolic steroids).

51. NATIONAL INSTITUTE ON DRUG ABUSE, RESEARCH REPORT SERIES: ANABOLIC STEROID ABUSE, 1 (Apr. 2000), available at <http://www.nida.nih.gov/pdf/rrsteroi.pdf> [hereinafter *ANABOLIC STEROID ABUSE*] (providing guide to steroid abuse in America); *Steroid Abuse in Today's Society*, *supra* note 49 (describing properties of anabolic steroids). “Steroids” refers to a class of drugs, and specifically, the full name for this class of steroids is “androgenic anabolic steroids.” *Steroid Abuse in Today's Society*, *supra* note 49. “Androgenic” refers to the masculinizing effects of testosterone, while “anabolic” refers to increased muscle mass resulting from higher levels of testosterone. *Id.*

52. 21 C.F.R. § 1300.01(b)(4) (2006) (identifying steroids and related forms of steroid or hormonal substances); see *Steroid Abuse in Today's Society*, *supra* note 49 (stating penalties for illegal sale or possession of anabolic steroids). Under the Anabolic Steroid Control Act of 1990, anabolic steroids are Schedule III drugs as defined in the Controlled Substances Act (CSA). See *Steroid Abuse in Today's Society*, *supra* note 49; see also *STERIOD INFOFACTS*, *supra* note 49 (listing legitimate uses for steroids). Doctors may prescribe steroids where an individual's body produces abnormally low amounts of testosterone, such as in cases of delayed puberty or some types of impotence. *STERIOD INFOFACTS*, *supra* note 49. Physicians also prescribe steroids to treat AIDS and various other diseases that result in decreased lean muscle mass. *Id.*

53. 21 U.S.C. § 844 (2000) (criminalizing unlawful possession of any amount of anabolic steroids); see also Rick Collins, *Changing the Game: The Congressional Response to Sports Doping via the Anabolic Steroid Control Act*, 40 NEW ENG. L. REV. 753, 754-59 (2006) (outlining history of legislation criminalizing anabolic steroids). Congress passed the Anabolic Steroid Control Act of 1990, which amended 21 U.S.C. § 812(c) (2000), criminalizing the illegal possession of anabolic steroids. *Id.* at 754-55. Although there are conceivably thousands of anabolic steroidal compounds, the 1990 Act only included twenty-seven steroidal compounds. *Id.* at 755. The Anabolic Steroid Control Act of 2004, signed by President Bush on October 22, 2004, added twenty-six new steroid compounds and further expanded the definition of “anabolic steroids” to include newly recognized “designer” steroids to the schedule as they become known. *Id.* at 757.

enhance their physical performance in sports.⁵⁴ Steroids increase one's strength, lean body mass, aggressiveness, endurance, and reduce recovery time between workouts.⁵⁵ Not all teens use steroids to increase athletic performance—many adolescents, including teenage girls, use steroids for cosmetic purposes.⁵⁶ The nationwide increase in steroid use over the past decade suggests that teens are ignoring the major health risks posed by steroids in favor of pursuing the immediate perceived benefits of superior athletic performance, building confidence, and improving physique.⁵⁷

Significant evidence shows that steroids threaten the physical and physiological health of anyone who uses them for non-medical purposes.⁵⁸ Additionally, steroids pose even greater danger to adolescent individuals, though the short-term side effects, such as sexual and reproductive disorders, fluid retention, and acne, can be reversed by discontinuing steroid use.⁵⁹ Steroids may also impact the psychological well-being of male and female users, causing depression, and long-term psychological damage.⁶⁰

On October 22, 2004, President Bush signed the Anabolic Steroid Control Act (ASCA), criminalizing the possession and distribution of many newer, evolving, “designer” steroids.⁶¹ The Act amended the existing federal anti-

54. See ANABOLIC STEROID ABUSE, *supra* note 51, at 3 (suggesting enhanced athletic performance as main reason behind steroid abuse).

55. See Steroid Abuse in Today's Society, *supra* note 49 (listing specific reasons why individuals use anabolic steroids).

56. STEROIDS WORKING GROUP, U.S. SENTENCING COMM'N, 2006 STEROIDS REPORT 23 (2006), available at <http://www.ussc.gov/USSCsteroidsreport-0306.pdf> [hereinafter 2006 STEROID REPORT] (noting adolescents use steroids to achieve enhanced cosmetic appearance). According to testimony from the United States Sentencing Commission and the House Committee on Government Reform, steroid abuse is not limited to athletes. *Id.* Adolescents, specifically young girls, use steroids for cosmetic reasons “to get a muscular or cut look.” *Id.*

57. Compare *id.* at 22 (outlining statistics showing increase in steroid use among students between 1995 and 2005), with *infra* notes 58-60 and accompanying text (describing serious health consequences resulting from anabolic steroid use).

58. Steroid Abuse in Today's Society, *supra* note 49 (detailing potential health risks posed by steroid use). Men and women may suffer cardiovascular effects such as heart damage and stroke. *Id.* Other possible side effects include high blood cholesterol levels, baldness, high blood pressure, liver disorders, sexual and reproductive disorders, and the risk of contracting HIV and other blood-borne diseases from using infected needles. *Id.* Anabolic steroids can have masculinizing effects in women, such as deepening of the voice and body and facial hair growth, which are not reversible. *Id.* Men may experience a reduced sperm count, infertility, baldness, the development of breasts, and an increased risk for prostate cancer. STEROID INFOFACTS, *supra* note 49 (outlining possible health hazards resulting from steroid abuse).

59. See Steroid Abuse in Today's Society, *supra* note 49 (stating pre-pubertal boys may suffer severe side effects from early-age steroid use). Young boys who use steroids may experience premature closure of the growth plates in long bones, potentially leading to height loss.

60. See ANABOLIC STEROID ABUSE, *supra* note 51 (describing possible psychological effects of steroids); Steroid Abuse in Today's Society, *supra* note 49 (listing psychological and lasting residual effects resulting from steroid use).

61. Anabolic Steroid Control Act of 2004, Pub. L. No. 108-358, 118 Stat. 1661 (2004) (codified as amended at 21 U.S.C. §§ 802-11 (2000)) (adding over sixty new substances to Schedule III of CSA); see also *supra* note 53 and accompanying text (delineating history of criminalization of anabolic steroids).

steroid statute, and committed \$15 million per year, over a five-year span, to new educational programs regarding anabolic steroids.⁶² Additionally, Congress has actively pressed the governing bodies of professional sports leagues to improve their drug testing policies.⁶³ It is unclear whether the increased scrutiny will curb student steroid abuse in high schools across America.⁶⁴

The recent implementation of stronger steroid policies in professional sports and the increased public awareness of steroid abuse should have a positive impact on young children who seek to emulate the physical feats and prowess of their favorite professional athletes.⁶⁵ While the major regulating bodies of professional sports took significant steps to strengthen their performance-enhancement drug policies, recent studies indicate school regulations and policies are lacking as steroid use amongst teenagers is higher today than it was a decade ago.⁶⁶ The National Institute on Drug Abuse estimates that more than a half million eighth- and tenth-grade students are using steroids, and a

62. Anabolic Steroid Control Act of 2004 §§ 4(c), (d), Pub. L. No. 108-358, 118 Stat. 1664 (codified as amended at 42 U.S.C. §§ 290bb-25f) (awarding grants to educate elementary and secondary school students on harmful effects of steroids). Each fiscal year, from 2005 to 2010, the ASCA authorizes \$15 million to “be used for education programs that will directly communicate with teachers, principals, coaches, as well as elementary and secondary school children concerning the harmful effects of anabolic steroids.” *Id.*

63. See 2006 STEROIDS REPORT, *supra* note 56, at 13-14 (outlining Congressional concern over need for stringent drug testing policy in Major League Baseball); Collins, *supra* note 53, at 756 (noting “searing” media attention on and intense congressional scrutiny of steroid legislation); see also Richard Sandomir, *STERIODS; Congress Keeps Pressure on Leagues*, N.Y. TIMES, May 19, 2005, at D2 (indicating four major sports league commissioners testified before Congress about intent to bolster drug policies).

64. Compare *supra* note 45 and accompanying text (stressing presidential interest in ridding society of enhancement drug abuse), and *supra* note 63 and accompanying text (detailing congressional interest in strengthening steroid regulations), with *infra* note 66 (providing adolescent steroid abuse statistics).

65. See *NFL General Counsel Adolpho Birch Speaks on the NFL’s Drug Policy*, VAND. J. ENT. L. & PRAC., Winter 2002, at 6 (discussing details of NFL’s drug policy and reasoning behind it). Birch indicated that the National Football League (NFL) initiated its policy on performance-enhancing drugs to ensure the competitive integrity of the game, avoid the negative health effects associated with performance-enhancing drugs, and to maintain a positive image for young people who are “vulnerable to [the] things that they see NFL players doing.” *Id.* at 6; see also Kathy Kiely, *NBA, NHL Under Pressure to Improve Drug-Testing Policies*, USA TODAY, Nov. 16, 2005, at 5C (discussing National Basketball Association’s (NBA) weaker performance-enhancing drug testing program); Paul Tagliabue, *Back Talk: What the N.F.L. Is Doing to Stamp Out Steroid Abuse*, N.Y. TIMES, Feb. 29, 2004, at Sports 10 (outlining NFL’s substance abuse program).

66. 2006 STEROID REPORT, *supra* note 56, at 22 (providing statistical breakdown of annual steroid abuse among students). Though the annual percentage of students using steroids in eighth-, tenth-, and twelfth-grades increased between 1995 and 2005, there has been a recent decrease in steroid abuse in all three grades. *Id.* But see STEROID INFOFACTS, *supra* note 49, (explaining current studies on teen steroid use). Although anabolic steroid abuse among high school students rose between 1990 and 2002, recent studies indicate that eighth- and tenth-graders’ steroid use declined. *Id.* The recent decline in eighth- and tenth-grade student steroid abuse could be attributed to advanced educational programs, such as the Atlas program. See ANABOLIC STEROID ABUSE, *supra* note 51, at 7 (discussing educational steroid prevention programs). The Atlas program, developed for male student football players, employs a “team centered approach” discussing the effects of anabolic steroids, teaching students how to refuse offers of drugs, and providing muscle growth alternatives, such as nutritional and weightlifting programs, that allow adolescents to improve their build without steroids. *Id.* at 7.

University of Michigan study showed that between 2000 and 2004, the Nation's eighth-, tenth-, and twelfth-grade students experienced peak rates in annual anabolic steroid use.⁶⁷

High school administrators and state lawmakers are trying to determine the most effective way to combat escalating steroid use amongst high school students.⁶⁸ Generally, detection and prevention roles are left to parents, coaches, and school administrators.⁶⁹ Although school districts typically utilize educational programs to battle steroids, some school districts are instituting steroid drug testing programs in response to increased steroid use.⁷⁰

2. Cognitive-Enhancement Drugs

Ritalin, Prozac, and Provigil, existing pharmacological enhancements, legally augment the brain functions of ill individuals, but are abused by healthy individuals.⁷¹ The likely development of stronger, more powerful neuroscience enhancements poses troubling legal and societal issues.⁷² Newer drugs, such as memory-enhancement drugs, which have the potential to help individuals who

67. Steroid Abuse in Today's Society, *supra* note 49 (revealing data on teenage steroid abuse); L.D. JOHNSTON, ET AL., 2006 DATA FROM IN-SCHOOL SURVEYS OF 8TH-, 10TH-, AND 12TH-GRADE STUDENTS: TRENDS IN USE OF VARIOUS DRUGS TABLE 1 (2006), *available at* <http://www.monitoringthefuture.org/data/06data.html#2006data-drugs> (providing annual statistical percentages of student drug use).

68. Mark Fainaru-Wada & Lance Williams, *Steroid Scandal; The BALCO Legacy; From Children to Pros, the Heat Is on to Stop Use of Performance Enhancers*, S.F. CHRON., Dec. 24, 2006, at A1 (supplying survey of current performance-enhancement education and testing policies employed by twenty-five states). Individual states employ varying approaches to educate and regulate the use of performance-enhancing drugs by high school students. *Id.* A majority of states provide education programs advising students of health risks and dangers resulting from steroid use. *Id.* Additionally, a number of states, such as California, Florida, Georgia, Louisiana, Maine, Michigan, New Jersey, and Oregon banned steroid use through anti-steroid legislation. *Id.* Connecticut, Illinois, and Pennsylvania are currently working on implementing anti-steroid legislation. *Id.*

69. *See id.* (identifying state legislation requiring coaches and parents to participate in steroid education).

70. *See* Michael S. Schmidt, *Critics Question the Effectiveness of New Jersey's High School Drug Tests*, N.Y. TIMES, Nov. 22, 2006, at D2 (questioning potential impact of New Jersey's newly implemented drug testing program). Critics question whether the costly drug testing program will deter student drug use as New Jersey's "groundbreaking" random drug testing program only tests .002% of the state's high school athletes. *Id.* In June of 2005, New Jersey's Inter-Scholastic Athletic Association adopted a drug testing program that only tests public and private school athletes competing in state playoffs. *Id.* Critics suggest either more comprehensive testing or additional anti-steroid education programs are necessary to combat the rampant drug abuse problem. *Id.*; *see, e.g.*, Baird Helgeson, *Committee Passes Statewide Testing for Use of Steroids: Lawmakers, Prep Coaches Endorse Pilot Program*, TAMPA TRIB., Mar. 31, 2005, at 1 (outlining pending legislation for requiring testing of students for performance-enhancing drugs); Seth Livingstone, *Fight Against Steroids Gaining Muscle in High School Athletics*, USATODAY.COM, July 8, 2005, http://www.usatoday.com/sports/preps/2005-06-08-sports-weekly-steroids-report_x.htm (suggesting awareness of health risks does not deter young students from using steroids); Dennis Semrau, *To Test or Not to Test? Steroids Concerns Grow*, CAPITAL TIMES (Madison, WI), May 19, 2005, at 2B (noting various school districts considering instituting random steroid testing for student-athletes).

71. Greeley, *supra* note 3, at 628 (identifying FDA-approved performance enhancers).

72. *See supra* notes 2 and 3 and accompanying text (discussing current and future issues regarding ethical, legal and societal impact of enhancement drugs).

suffer from actual mental disorders, may be misused by healthy individuals to achieve artificial accomplishments.⁷³ Recognizing the widespread use of stimulants, such as Ritalin, to elevate brain function, critics are questioning what impact neuroscience enhancements could have on our society in the near future.⁷⁴

Ritalin is a performance-enhancing drug that impacts the central nervous system.⁷⁵ Generally, Ritalin and other stimulants, such as Adderall and Dexedrine, are used to treat children diagnosed with Attention-Deficit Disorder (ADD) and Attention-Deficit/Hyperactivity Disorder (ADHD).⁷⁶ Ritalin works to reduce fatigue and distraction, enhance self-esteem, improve mental and physical abilities, and increase endurance, productivity, and concentration.⁷⁷ Ritalin not only enhances the mental and physical performance of individuals with narcolepsy, ADD, or ADHD, but also healthy individuals illegally using the drug.⁷⁸

73. See PRESIDENT'S COUNCIL ON BIOETHICS, STAFF WORKING PAPER "BETTER" MEMORIES? THE PROMISE AND PERILS OF PHARMACOLOGICAL INTERVENTIONS (Dec. 2002), available at http://www.bioethics.gov/background/better_memories.html (discussing double-edged sword problem presented by new class of memory-enhancement drugs).

74. Greely, *supra* note 3, at 629 (discussing societal implications of neuroscience enhancement drugs); see Deardorff, *supra* note 3, at Q1, (questioning effect cognitive enhancement drugs will have on society); William Safire, Op-Ed., *The But-What-if Factor*, N.Y. TIMES, May 16, 2002, at A25 (pondering consequences neuroscience enhancement drugs will have on public).

75. See NATIONAL DRUG INTELLIGENCE CENTER, RITALIN, FAST FACTS, QUESTIONS AND ANSWERS 1 (2003), available at <http://www.usdoj.gov/ndic/pubs6/6444/6444p.pdf> [hereinafter FAST FACTS] (explaining common uses and abuses of Ritalin). Ritalin is the trade name for a prescription drug called "methylphenidate," which affects the central nervous system. *Id.* at 1. Because Methylphenidate is a Schedule II substance, under the CSA, abuse of Ritalin is illegal. *Id.*; see PRESIDENT'S COUNCIL ON BIOETHICS, STAFF BACKGROUND PAPER, HUMAN FLOURISHING, PERFORMANCE-ENHANCEMENT, AND RITALIN (Dec. 2002), available at <http://www.bioethics.gov/background/humanflourish.html> [hereinafter HUMAN FLOURISHING] (discussing ethical concerns regarding explosion of Ritalin use in America). Ritalin is a "universal performance enhancer" which "[h]elps anyone, child or adult, ADHD or not, to perform better." HUMAN FLOURISHING, *supra*. See generally NATIONAL INSTITUTE ON DRUG ABUSE, U.S. DEP'T OF HEALTH AND HUMAN SERVS., INFOFACTS: METHYLPHENIDATE (RITALIN) (May 2006), available at <http://www.drugabuse.gov/pdf/infofacts/Ritalin06.pdf> [hereinafter RITALIN INFOFACTS] (providing pertinent facts regarding Ritalin and its health effects).

76. Craig S. Lerner, "Accommodations" for the Learning Disabled: A Level Playing Field or Affirmative Action for Elites?, 57 VAND. L. REV. 1043, 1071-75 (2004) (examining explosion of ADD and ADHD diagnosis in children over past two decades). There is no precise definition or diagnosis procedure for ADD or ADHD. *Id.* at 1072-73. Common symptoms, such as difficulty concentrating, inattentiveness, impulsivity, and hyperactivity are sought to confirm an ADD or ADHD diagnosis in children. *Id.* at 1065-68. The most common indicator of a correct ADD or ADHD diagnosis occurs "[w]hen the drugs have the desired effect, [and] that is considered proof that the child does indeed have an attention deficit disorder." *Id.* at 1069; see DRUGS OF ABUSE, *supra* note 4, at 34 (outlining history of amphetamines and amphetamine products like Adderall and Dexedrine).

77. HUMAN FLOURISHING, *supra* note 75 (describing significant enhancement features of Ritalin); see also DRUGS OF ABUSE, *supra* note 4, at 31 (listing legitimate prescribed medical uses for stimulants).

78. See DRUGS OF ABUSE, *supra* note 4, at 31-32 (listing reasons why people often abuse stimulants). Stimulants are illegally abused for a variety of reasons, including acquiring a sense of exhilaration, enhancing self esteem, reducing appetite, increasing alertness and wakefulness, and to "get high." *Id.*; see also HUMAN FLOURISHING, *supra* note 75 (revealing Ritalin has similar cognitive and physical effects on all individuals).

The market for neuroscience enhancement drugs is exploding.⁷⁹ Total sales increased by 300% over the past four years, surpassing \$3.6 billion last year.⁸⁰ Disturbingly, Adderall sales increased 3,135% over the same four-year period.⁸¹ Surprisingly, the dramatic increase in neuroscience-enhancement drug use has not been the focus of much discussion or data collection.⁸² Some critics attribute the lack of attention to the section of society using the enhancement drugs: “super-motivated” students.⁸³ School officials and law enforcement traditionally pay more attention to adolescents involved in long-established vices, such as drugs and alcohol, as opposed to driven, healthy, A-plus students abusing performance-enhancement drugs.⁸⁴

The performance enhancement capabilities for “learning disabled” and healthy individuals alike has led students across the country to turn to Ritalin to gain a competitive advantage in their academic pursuits.⁸⁵ Ritalin is considered “the academic equivalent to doping in sports.”⁸⁶ Ritalin acts as a steroid for the brain, greatly enhancing an individual’s energy and increasing the ability to concentrate, giving students using the drug a significant advantage over students who are not.⁸⁷ In light of the escalating use of Ritalin for competitive gain in the academic setting, students and critics are questioning the moral,

79. Garreau, *supra* note 2, at D01 (reporting remarkable sale increases in cognitive-enhancement industry).

80. Garreau, *supra* note 2, at D01 (reviewing staggering cognitive-enhancement industry sales statistics).

81. Garreau, *supra* note 2, at D01 (noting staggering increase in cognitive-enhancement drug use in America).

82. Garreau, *supra* note 2, at D01 (discussing lack of “smart-pill” focus in data collection); Greely, *supra* note 3, at 608 (indicating very little debate about ethical, social, and legal issues raised by neuroscience enhancement drugs).

83. See Garreau, *supra* note 2, at D01 (suggesting police less attentive to educational achievers using enhancement drugs); *infra* note 85 (discussing use of enhancement drugs to improve academic performance).

84. See Nadler, *supra* note 5, at 72 (investigating school’s disinterest in regulating Ritalin abuse); Garreau, *supra* note 2, at D01 (noting police more concerned with alcohol and drug abuse than students abusing performance-enhancing drugs). Ritalin and Adderall abuse is “definitely something that goes totally unwatched by the administration,” reveals a college student, “[i]t’s something that’s fun, it’s easy to get, and it doesn’t seem as serious as using a real drug.” Nadler, *supra* note 5, at 72.

85. See Jacobs, *supra* note 5, at 4A (investigating use of performance enhancers in colleges). A recent survey of individual college campuses revealed that at least 20% of college students use Ritalin or Adderall to study, write papers, and take exams. *Id.* One college student, a civil engineering major at Columbia expressed that using Adderall is “[c]heating, and it really bothers me.” . . . “I mean, everyone here is smart. They should be able to get by without the extra help.” *Id.*; see Reinink, *supra* note 5, at A29 (reporting on Ritalin abuse among teens). Students who use Ritalin to cram for final exams call it a “wonder drug.” Reinink, *supra* note 5, at A29 A psychiatrist at CU Boulder admits, “[w]e’re not sure how, as clinicians, we can track or prevent abuse. . . . [w]e try to encourage and support good use. . . . I absolutely don’t know another way of enforcing it.” *Id.*

86. Deardorff, *supra* note 3, at Q1 (noting students’ impression of Ritalin). Healthy students are increasingly using Ritalin, also known as a “smart pill” or a “cognitive performance enhancer,” to bolster their academic performance and gain an unfair edge over their peers. *Id.* Students and professionals use Ritalin to sharpen their focus and increase their memory. *Id.*

87. See *supra* note 5 (discussing pressure on students to use Ritalin or Adderall to compete with peers).

ethical, and legal impact of performance-enhancement drug abuse.⁸⁸

Given the nationwide-increase in Ritalin use, concern over possible negative long-term health effects, and increased health risks among adolescents who use the drug, is growing.⁸⁹ There have been increased reports of sudden death amongst individuals taking stimulants, mostly children, and some studies indicate stimulants might increase the risk of strokes and serious arrhythmias in children and adults.⁹⁰ In addition to the potential physical harms associated with Ritalin abuse, there may be significant mental health risks, such as psychotic episodes and psychological addiction, induced by Ritalin abuse.⁹¹ Using Ritalin, listed in Schedule II of the CSA since 1971, without a prescription is illegal.⁹² Due to the relative ease with which children may obtain prescriptions for Ritalin, abusers have little trouble procuring it from classmates or friends who have “legitimate” prescriptions.⁹³

III. ANALYSIS

Suspicionless drug testing in public high schools is largely limited to students involved in sports, extracurricular activities, and students who drive to

88. See HUMAN FLOURISHING, *supra* note 75 (inferring students substantially abuse Ritalin to gain competitive advantages in classroom). Increased use of Ritalin is ethically and morally troubling. *Id.* Ritalin treatment raises questions as to whether substituting medicine for teaching and learning might have long-term harmful effects on children who suffer from nothing worse than hyperactivity. *Id.* One major concern is that the “use of Ritalin by some to improve their performance is “unfair” to others who [cannot] or [will not] obtain Ritalin under-the-counter.” *Id.* The problem regarding Ritalin is a perplexing one because of the sheer number of students who have legitimate prescriptions and the ease with which non-diagnosed students can obtain it. *Id.* One suggestion is to “[h]ave a free Ritalin pill supply at the door as students file into the testing room, so that all who wished to take it could do so, and we would know it was being properly administered.” *Id.*; see Khan, *supra* note 4, at 1B (suggesting as many as one-in-five college students use Ritalin illegally to enhance studying). Students who do not use Ritalin are concerned that students illegally abusing it are cheating them out of a fair education. Khan, *supra* note 4, at 1B One student believes “it’s deceptive. A GPA is what employers and graduate schools use to select students. It is supposed to be indicative of your natural academic ability I want to graduate and get a good job. If someone is passing off their drug-enhanced GPA for a natural one, it’s unfair.” *Id.*

89. Gardiner Harris, *Warning Urged on Stimulants Like Ritalin*, N.Y. TIMES, Feb. 10, 2006, at A1 (reporting on FDA’s growing concern over health concerns of stimulants). A federal advisory panel affirmatively voted to require drug manufacturers, such as Novartis, the manufacturer of Ritalin, to put prominent labels warning of serious possible health consequences on bottles of stimulant drugs. *Id.*; see DRUGS OF ABUSE, *supra* note 4, at 34 (describing documented abusive uses of Ritalin). Ritalin has a high potential for abuse with similar cognitive effects as cocaine and amphetamines. DRUGS OF ABUSE, *supra* note 4, at 34. Addicts dissolve Ritalin tablets in water and inject the mixture. *Id.* Adolescents abusing Ritalin crush the tablets and snort the substance to induce a high. *Id.*

90. See Harris, *supra* note 89, at A1 (noting concerns of researchers who study long-term effects of stimulants).

91. See FAST FACTS, *supra* note 75 (noting health risks to non-prescribed Ritalin users).

92. See *supra* note 75 (noting use of Ritalin without prescription is illegal).

93. Compare *supra* notes 76 and 85 (noting vague diagnosis procedures for ADD and ADHD), with Drug Enforcement Admin., U.S. Dept. of Justice, Chapter 5 Stimulants, <http://www.usdoj.gov/dea/pubs/abuse/5-stim.htm> (last visited May 13, 2007) (suggesting abusers could secure Ritalin with ease from classmates or friends).

school.⁹⁴ To address the escalating performance-enhancing drug problem in public high schools sufficiently, suspicionless drug testing programs should be initiated or expanded to test for performance-enhancing drugs in areas where there is a demonstrated problem and genuine concern.⁹⁵ The Supreme Court has held that suspicionless drug testing programs are constitutional only as applied to students who are engaged in athletics or extracurricular activities and, consequently, have lower privacy expectations.⁹⁶

Students, who illegally use performance-enhancing drugs in classes, exams, standardized tests, and athletic competition, are cheating the educational system and other students by gaining an unfair advantage and breaking the law.⁹⁷ By allowing the escalating abuse of performance-enhancement drugs to continue without the threat of randomized testing, schools may be effectively forcing healthy students to abuse the drugs to compensate for what would otherwise be too great a disadvantage to overcome in the competitive school environment.⁹⁸ Because Ritalin and anabolic steroid abuse threatens students' rights to a fair and just educational experience, as well as the health and safety of the students who are illegally using performance-enhancing drugs, the government's "special need" to ensure a fair and safe environment at public high schools will justify the slightly increased invasion of student privacy.⁹⁹

A. *Randomized Drug Testing Policies and the Nature of the Privacy Interest Intrusion*

A student's privacy interest is inherently limited in a public school setting where the state is responsible for maintaining and regulating discipline, health, and safety.¹⁰⁰ Students must adhere to school rules, regulations, medical

94. See *Bd. of Educ. v. Earls*, 536 U.S. 822, 839 (2002) (holding random drug testing of students involved in extracurricular activities constitutional); *Todd v. Rush County Schs.*, 133 F.3d 984, 985-87 (7th Cir. 1998) (holding drug testing for students who drive to and from school constitutional).

95. See *supra* notes 36-40 and accompanying text (explaining governmental interest in deterring abuse of drugs sufficient to institute drug testing program); see also *Miller v. Wilkes*, 172 F.3d 574, 576 (1999) (holding drug testing program including testing for misused prescription drugs constitutional); *supra* note 70 (discussing newly initiated steroid testing programs for student-athletes in New Jersey).

96. See *Vernonia Sch. Dist. 47j v. Acton*, 515 U.S. 646, 664-65 (1995) (holding suspicionless drug testing program constitutional as applied to athletes); *Earls*, 536 U.S. at 838 (holding suspicionless drug testing program constitutional as applied to athletes and students involved in extracurricular activities).

97. See *supra* notes 85 and 88 and accompanying text (analyzing various reasons why students abuse performance-enhancing drugs and effects of such abuse); see also *State of the Union Address*, *supra* note 45 (criticizing unfair use of performance-enhancing drugs).

98. See *HUMAN FLOURISHING*, *supra* note 75 (describing growing ethical concerns regarding widespread Ritalin use in today's competitive society); see also *Jacobs*, *supra* note 5, at 4A (interviewing healthy students at top-tier university who illegally take Ritalin).

99. See *supra* note 88 and accompanying text (discussing viewpoint of students competing against performance-enhanced students); *supra* notes 58-60, 89-91, and accompanying text (recognizing considerable negative health consequences resulting from using stimulants or steroids); see also *Earls*, 536 U.S. at 834 (noting nature of urine sample collection and limited disclosure of results as insignificant intrusion).

100. *Vernonia*, 515 U.S. at 656-57 (reasoning student's Fourth Amendment privacy rights limited in high

examinations, and requisite vaccines.¹⁰¹ Ensuring a safe and secure environment in a public high school often requires strict controls and restrictions that, in other settings, would impose upon an individual's privacy rights.¹⁰² In *Earls*, the Supreme Court indicated that the varying levels of a student's privacy interest, depending on whether the student was involved in athletics or non-athletic extracurricular activities, was not as essential to its decision to affirm the drug testing program as was the school's custodial responsibility and authority.¹⁰³ Consequently, expanding randomized drug testing to include all students should be viewed in a similar light.¹⁰⁴ High schools are responsible for providing a safe and fair environment for all students, not just students with lower privacy expectations.¹⁰⁵

B. Character of the Intrusion Imposed by Policy

In relation to currently instituted and approved random drug testing programs, the character of the intrusion would not be dramatically altered by adding performance-enhancing drugs to the list of tested substances.¹⁰⁶ In *Vernonia*, the Supreme Court approved a testing method that collected urinalysis samples from students in conditions similar to those an individual would find in a public restroom.¹⁰⁷ Consequently, the Court determined that the impact of the testing upon the students' privacy rights, both male and female, was negligible.¹⁰⁸ As the urinalysis test that the Vernonia school district employed to identify illegal drugs is adequate to detect most forms of performance-enhancing drugs, the test procedure would not have to be altered,

school environment).

101. *Id.* at 656 (noting routine situations where all students' privacy rights similarly intruded upon in school setting).

102. *Bd. of Educ. v. Earls*, 536 U.S. 822, 830-31 (2002) (analyzing reduced student privacy interest in light of unique nature of school's guardian role).

103. *Id.* at 831 (stating school's interest in securing order in school environment as most significant element of analysis). The respondents argued that children participating in non-athletic extracurricular activities have a higher privacy expectation than those involved in athletic activities because they are not subjected to the regular physicals and communal undress a student athlete encounters. *Id.* The Court disagreed, minimizing the significance of the varying degrees of student privacy expectation and indicating that its decision in *Vernonia* "depended primarily upon the school's custodial responsibility and authority." *Id.*

104. *Id.* at 831 (indicating school's custodial responsibility more essential to constitutional determination than student's varying privacy expectations).

105. *Id.* at 830-31 (noting school's responsibility to provide secure environment for all students). "Without first establishing discipline and maintaining order, teachers cannot begin to educate their students. And apart from education, the school has the obligation to protect pupils from mistreatment by other children . . ." *Id.* at 831 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 350 (1985) (Powell, J., concurring)).

106. *See supra* note 8 and accompanying text (highlighting school districts employing urinalysis programs to test for abused prescription medicines and steroids).

107. *Vernonia Sch. Dist. 47j v. Acton*, 515 U.S. 646, 658 (1995) (describing method employed by Vernonia School District for collecting urine sample).

108. *Id.* at 658 (determining drug testing conditions similar to circumstances students encounter in public restrooms). The Court stated "[u]nder such conditions, the privacy interests compromised by the process of obtaining the urine sample are in our view negligible." *Id.*

and the impact on the students' privacy rights would not change.¹⁰⁹

The other privacy-invasive aspect of the urinalysis test relates to the information it discloses to parties privy to the testing results.¹¹⁰ An individual's sense of privacy may be intruded upon when others have access to information regarding the individual's physical and mental health.¹¹¹ To avoid being overly invasive, the tests should focus on the specific drugs that they are aimed at preventing, such as performance-enhancing drugs and other illegal substances.¹¹² Furthermore, to avoid any sanctions for testing positive for performance-enhancing drugs, students should have the opportunity to indicate in advance that they are taking prescription medicine.¹¹³ The test results should be disclosed to a limited and select group of individuals, dealt with internally, and not turned over to law enforcement officials.¹¹⁴ School districts and school administrators should have the discretion to determine sanctions, which should resemble those punishments administered to students who are caught cheating on exams.¹¹⁵ Similar to the traditional cheater, a student using performance-enhancing drugs is improving his or her academic or athletic performance, through unfair means.¹¹⁶

C. Governmental Interest and Efficacy of the High School Suspicionless Drug Testing Policy, Including Testing for Performance-Enhancement Drugs

The government's interest in preventing the use of illegal performance-enhancing drugs is considerable, arguably compelling, and important enough to justify the type of search at issue.¹¹⁷ Preserving the integrity of the educational and athletic system is crucial to providing an equitable and safe educational environment for children.¹¹⁸ Turning a blind eye to performance-enhancing drugs condones the achievements of those who are abusing the drugs and

109. See *supra* notes 8, 31-35 (outlining typical drug testing programs and testing methods for performance-enhancing drugs).

110. See *Vernonia*, 515 U.S. at 658-69 (analyzing privacy intrusion stemming from drug tests results disclosure).

111. *Id.* at 658 (noting intrusive nature of drug tests).

112. *Id.* (explaining test results limited to small class of people who require such information).

113. *Vernonia Sch. Dist. 47j v. Acton*, 515 U.S. 646, 658-59 (1995) (discussing requirement to disclose any legitimately prescribed drugs in advance to avoid complications).

114. *Id.* at 658 (emphasizing drug testing results not disclosed to anyone except school personnel).

115. See *New Testing Programs*, *supra* note 8 (outlining various ways schools punish students for testing positive for steroids).

116. See *Bd. of Educ. v. Earls*, 536 U.S. 822, 833-34 (2002) (describing sanctions imposed for violating school's drug policy); see also *supra* note 88 (discussing ethical concerns, such as cheating, posed by students who illegally use performance-enhancing drugs).

117. See *State of the Union Address*, *supra* note 45 (stating preventing youth abuse of performance-enhancing drugs issue of national concern).

118. See *New Jersey v. T.L.O.*, 469 U.S. 325, 339-40 (1985) (stating students' privacy interest must be balanced against school administrators' substantial interest in maintaining order). The preservation of order in the classroom and a "proper educational environment" requires the close supervision of students and the enforcement of the school's rules. *Id.*

diminishes the accomplishments of students who are drug-free.¹¹⁹ Protecting adolescents from the physical, physiological, and psychological harms of performance-enhancing drugs is essential to a school's role as a caretaker.¹²⁰ Performance-enhancing drugs can have an even more severe impact on younger children than adults, and the abuse of drugs, such as Ritalin and steroids, at a young age can lead to more serious drug abuse later in life.¹²¹

In *Earls*, the Supreme Court did not require specific evidence of an existing drug problem within the school district.¹²² Instead, the Court indicated that the nation's considerable drug use problem "makes the war against drugs a pressing concern in every school."¹²³ Considering the school districts' interest in protecting and educating today's youth against the dangers of performance-enhancing drug and the statistics indicting escalating anabolic steroid and Ritalin abuse amongst teenagers, the war against performance-enhancing drugs is a growing concern that state legislators and school administrators need to address.¹²⁴

Testing all students for performance-enhancing drugs is an effective means for school districts to maintain a fair and safe school environment.¹²⁵ For the testing programs to be effective, school officials must test the entire student body.¹²⁶ Limiting the testing to students involved in athletics and extracurricular activities would render the testing ineffective because many students would still be able to use performance-enhancing drugs, such as Ritalin, to improve academic performance.¹²⁷ Perhaps the random suspicionless anabolic steroid testing could be limited to student athletes, as

119. See *supra* notes 2-5 and accompanying text (describing inequitable circumstances resulting from students illegally using performance-enhancing drugs to detriment of peers).

120. See *supra* notes 58-60 and 89-91 and accompanying text (listing health risks associated with anabolic steroids and Ritalin); see also *Earls*, 536 U.S. at 836-37 (safety interests of children factor largely into "special needs" analysis). The Court stated that the drugs pose a variety of health risks for all children and the "safety interest furthered by drug testing is undoubtedly substantial for all children, athletes and nonathletes alike." *Earls*, 536 U.S. at 836.

121. See *id.* at 836 (reasoning schools need not wait until students develop serious drug problems before instituting drug policies). The Court refused to articulate a threshold level of drug abuse amongst students to justify a drug testing program, instead suggesting that "it would make little sense to require a school district to wait for a substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program designed to deter drug use." *Id.*

122. *Bd. of Educ. v. Earls*, 536 U.S. 822, 835-36 (2002) (stating no demonstrated drug problem necessary to implement drug testing policy).

123. *Id.* at 834 (addressing significant interest of all schools in combating student drug problems).

124. *Supra* notes 4, 66, 86 and accompanying text (listing alarming trend of anabolic steroids and Ritalin abuse among students).

125. *Earls*, 536 U.S. at 838 (concluding drug testing policy effective to further state's important interest in deterring drug use).

126. See *supra* notes 4 and 86 and accompanying text (indicating widespread Ritalin abuse in Nation's classrooms).

127. See *supra* notes 3, 70, 120 (noting drug risk for all children and limits on testing programs could render results pointless).

anabolic steroid abuse is expensive and heavily concentrated among athletes.¹²⁸ Alternatively, testing only a portion of the student body for Ritalin would be pointless, and would allow the cheating and abuse to continue largely uninhibited.¹²⁹

Although randomized testing for performance-enhancing drugs may appear drastic, the problem will only grow more severe as researchers create newer and more effective performance-enhancing drugs.¹³⁰ Without testing, an expansive gap will continue to grow between students who illegally use drugs and those who abstain.¹³¹ While educational programs may appear to be less costly and invasive, the perceived benefits of performance-enhancing drugs will sway impressionable adolescents struggling to thrive in a competitive academic setting.¹³² The fear of drug testing and the corresponding consequences may be the only way to ensure a fair educational experience for every student.¹³³ Where an immediate or looming performance-enhancing drug problem exists, lawmakers and school administrators must take the necessary steps to initiate constitutionally protected drug testing programs.¹³⁴

IV. CONCLUSION

As performance-enhancing drugs further pervade our society, athletic and academic accomplishments will be subject to manipulation by individuals who abuse such drugs. Cognitive and physical enhancement drugs will only become more powerful as pharmaceutical companies conduct further research and development. With few restrictions on the current abuse of performance-enhancing drugs in high schools, the potential for increased student abuse in the future is significant.

Following recent steroid scandals in professional sports, and President Bush's 2004 State of the Union Address, awareness of the ethical and health issues surrounding performance-enhancing drugs is heightened. Unfortunately, nationally acknowledging that a problem exists in public high schools is not sufficient to deter young students from using these drugs. To young,

128. See *supra* note 70 (discussing criticisms of high monetary cost of steroid testing program in New Jersey).

129. See ANABOLIC STEROID ABUSE, *supra* note 51, at 3 (noting desire to improve athletic performance driving factor behind steroid abuse).

130. See *supra* notes 2-3 and 73-74 and accompanying text (recognizing impact future cognitive-enhancement drugs may have on humanity).

131. See *supra* note 1 and accompanying text (suggesting development of more effective performance-enhancing drugs could create additional inequities in all aspects of life).

132. See *supra* note 70 (suggesting educational programs alone not sufficient to combat steroid abuse).

133. See *supra* note 70 (noting New Jersey's implementation of steroid testing program to combat steroid problem).

134. Kher, *supra* note 3, at 98 (providing guide to future performance-enhancing drugs); see also HUMAN FLOURISHING, *supra* note 75 (suggesting solution to performance-enhancing drug abuse involves providing free supply to all students).

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impressionable students, the perceived benefits of performance-enhancing drugs often outweigh the slight risk of being caught or punished for cheating. Without fear of punishment, students will continue using drugs that provide them with artificial mental and physical advantages over their peers. Federal, state, and local legislators must take advantage of current public opinion and institute legislation regulating the use of all performance-enhancing drugs in public high schools. School Districts across the Nation must implement or expand suspicionless drug testing programs to detect and regulate drugs that deprive un-enhanced students from enjoying an educational and athletic experience where their skills are judged on natural ability and not according to which drugs they are abusing.

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